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IN THE

Supreme Court of the United States

October Term, 1957

No. 593

MAURICE HAAS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS BENDER,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction and others under Section 371, Title 18, U. S. C., of conspiracy to defraud the United States by impeding and obstructing the function of the Treasury Department in the collection of income taxes.

Opinions Below

The opinion of the Court of Appeals is unreported and is printed in the Appendix (A1-23).[1] Opinions of the Dis-

[1] Letter "A" refers to appendix to petition; Roman numerals I-IV refer to appendix to appellant's brief in Court of Appeals.

trict Court are reported as *United States* v. *Klein*, 124 F. Supp. 476, 18 F. R. D. 439, 131 F. Supp. 807, 139 F. Supp. 135, and *United States* v. *Haas*, 126 F. Supp. 817.

Jurisdiction

The judgment of the Court of Appeals was entered September 3, 1957 (A24). Petition for rehearing was denied October 3, 1957 (A25-26). Jurisdiction of this Court is invoked under Section 1254(1), Title 28, U. S. C.; also, Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

Questions Presented

1. In denying the motions for judgment of acquittal, was the trial court correct in applying the same standard of evidence applicable in a civil case, *i.e.*, by a mere preponderance of the evidence, when that rule is in conflict with most other jurisdictions, as well as the opinions of this Court?

2. Was it a violation of Haas' Constitutional rights under the Fifth Amendment, warranting a dismissal of the indictment, to subpoena him before the Grand Jury at a time when he was marked for indictment by the prosecution, and without warning him of his Constitutional rights, elicit testimony from him, particularly in view of this Court's opinion in *United States* v. *Minker*, 350 U. S. 179, (1956)?

3. Wasn't this conspiracy barred by the three year statute of limitations under this Court's decision in *Grunewald* v. *United States*, 353 U. S. 391, inasmuch as it was merely a subsidiary agreement to conceal a prime conspiracy already accomplished?

4. Wasn't the conviction obtained, on a charge varied and altered by the trial court, in violation of due process and the Sixth Amendment?

5. Can the prosecution avoid the statute of limitations applicable to a conspiracy to commit a substantive offense, avoid the principles of *res judicata* and double jeopardy, avoid the limitation of Section 371, Title 18, U. S. C., which provides for only one crime of conspiracy, by camouflaging a crime already charged and barred under a separate charge of conspiracy to defraud the United States by interfering with a function of the Government?

6. When the nature of the services rendered by a certified public accountant and tax attorney is measured by applicable regulations of the Commissioner of Internal Revenue, is it not a violation of due process to deny his requests to instruct the jury of the content of those regulations and his rights and duties thereunder?[2]

The Constitutional Provisions and Statutes Involved

See Appendix

Amendments 5 and 6, Constitution of the United States

Title 18, U. S. C.
§§ 371, 3282

Title 26, U. S. C.
§§ 145(a), (b), 3748

Federal Rules of Criminal Procedure
Rule 52(a)

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[2] Haas adopts the additional arguments for reversal in the petitions of Alprin and Klein insofar as they apply to petitioner Haas.

Statement

Maurice Haas is a graduate of New York University School of Commerce and New York University Law School (III, 1829). In May, 1920, he was licensed as a certified public accountant in New York (III, 1830), and thereafter was admitted to practice law in the State of New York in February, 1926 (III, 1830). From September, 1916, to the present he has been engaged principally in the practice of accountancy (III, 1830), at first under a co-partnership, Haas & Schlesinger (III, 1830), and thereafter, from 1940, in partnership under the name Haas, Schlesinger & Mayers, at 122 East 42nd Street, New York City (III, 1830; I, 473).

Haas, Schlesinger & Mayers were engaged in the general practice of accounting, including the periodic auditing of records, preparation of tax returns, representation of persons before the Treasury Department, preparation of financial statements on verification where statements were for public use and without verification where statements were for the client's personal use (III, 1833).

Haas took the stand and testified. He was sentenced to two years imprisonment and a non-committed fine of $4,000.00.

I

In denying the motions for judgment of acquittal, was the trial court correct in applying the same standard of evidence applicable in a civil case, *i.e.*, by a mere preponderance of the evidence, when that rule is in conflict with most other jurisdictions, as well as the opinions of this court?

In considering the motions for judgment of acquittal, the trial court sought to obtain from counsel for both sides an agreement as to the proper standard of evidence to

apply (II, 717-723). The trial court indicated it could not apply the test laid down in other Circuits, namely, "When a motion for a judgment of acquittal is made, the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the Government, tends to show the defendant is guilty, beyond a reasonable doubt." *United States* v. *Yeoman-Henderson, Inc.*, 7 Cir., 193 F. 2d 867, 869; *Cooper* v. *United States*, CA DC, 218 F. 2d 39; *Curley* v. *United States*, CA DC, 160 F. 2d 229; *Nanfito* v. *United States*, 8 Cir., 20 F. 2d 376, 379.

The standard that the trial court applied was that applicable in a civil case, *i.e.*, the Government can go to the jury if it proves its case by a mere preponderance of the evidence. Thus, the trial court stated:

> "The Court: Well, I get my sailing orders from my Circuit Court, and * * * they point out that for the testing of whether a motion for a judgment of acquittal shall be granted or denied, the test is the same in the civil and criminal case." (II, 718-719).

The court further stated:

> "Now then, as I understand the decisions, not what the reasonable man will consider beyond a reasonable doubt to be the test, but merely a preponderance." (*id.* 719).

The trial court correctly reflected the rule that now exists in the Second Circuit. *United States* v. *Masiello and Stickel*, 2 Cir., 235 F. 2d 279, cert. den. 352 U. S. 882; *United States* v. *Castro*, 2 Cir., 228 F. 2d 807; *United States* v. *Costello*, 221 F. 2d 668, 680, cert. granted 352 U. S. 988; *United States* v. *Feinberg*, 2 Cir., 140 F. 2d 592, 594.

In almost all of these cases the late Circuit Judge Jerome Frank, while concurring in the result for other reasons, criticized the standard and held it to be "erroneous": *United States* v. *Masiello and Stickel*, *supra*, at

page 288. Because of the conflict between the Second Circuit in this regard and the majority of the other Circuits, Circuit Judge Frank urged this court to settle the conflict in order to remove the injustices that can arise from its application. *United States* v. *Castro*, *supra*; *United States* v. *Costello*, *supra*.

Indeed, the Second Circuit standard would likewise seem to be in direct conflict with this court's opinions in *United States* v. *National Association of Real Estate Banks*, 339 U. S. 485, 493, and in *Davis* v. *United States*, 160 U. S. 469, 487-488. Cf. Opinion of Mr. Justice Harlan, on a motion by the defendant for a stay and continuance of bail in *Stickel* v. *United States*, 76 S. Ct. 1067, 1 Law Ed. 2d 30 (1956).

In the instant case, the opinion of the Second Circuit does not indicate that the prosecution's proof was strong enough to go to the jury regardless of the standard applied, as it did in *United States* v. *Masiello and Stickel*, *supra*. The Second Circuit did not even refer to the point in its opinion, although the issue was again referred to the court in the petitions for rehearing.

No better illustration of the injustice that can arise from the application of the Second Circuit standard is what took place in the instant situation. The trial court denied the motions for judgment of acquittal both at the conclusion of the Government's case and at the conclusion of the entire case because the jury, as reasonable men, might conclude guilt if any one of several hypotheses of fact were accepted as proved by the prosecution (II, 802-805). Yet, several of these hypotheses were inconsistent and contradictory propositions of fact. Thus, as to all the petitioners, the prosecution's evidence was as "consistent with innocence as with guilt." In most jurisdictions the application of the "reasonable doubt" standard would have required the granting of the motions for judgment

of acquittal under these circumstances. *Parnell* v. *United States*, 10 Cir., 64 F. 2d 324, 329; *United States* v. *Matsinger*, 3 Cir., 191 F. 2d 1014, 1016; *Caudler* v. *United States*, 5 Cir., 146 F. 2d 424, 426; *Isbell* v. *United States*, 8 Cir., 227 Fed. 788, 792; *United States* v. *Maghinang*, D. C. Del., 111 F. Supp. 760, 761-762; *United States* v. *Md. & Va. Milk Producers Association*, D. C. D. C., 90 F. Supp. 681.

Indeed, even on the level of the civil standard, the motions for judgment of acquittal should have been granted because "circumstances equally consistent with several hypotheses prove neither; and the party having the burden must fail." *Mutual Life Ins. Co. of New York* v. *Hess*, 5 Cir., 161 F. 2d 1, 4.

The application of the Second Circuit standard was particularly prejudicial to petitioner Haas since the inferences which a reasonable man could conclude in finding him guilty added up to a series of legitimate acts and transactions as a certified public accountant and tax attorney, which by conjecture, suspicion and mere association with his co-defendants a conviction was sought and had. It is significant that in denying the motion as to Haas, the trial court reemphasized that he was applying the civil test:

> "It must be borne in mind that the court is now dealing only with motions for judgments of acquittal and *must determine them on the basis of the test previously herein set forth.*" (I, 805; italics supplied)

Circuit Court Judge Frank seems to intimate in *United States* v. *Masiello and Stickel*, *supra*, ftn. 10, p. 291, that the rationale for the rule in the Second Circuit, with which he disagreed, was to afford the prosecution greater latitude in going to the jury since it cannot appeal from a judgment of acquittal.

If this be the reason behind the Second Circuit ruling, it treads upon a legislative function concerning a matter the legislature has not seen fit to change. Moreover, to all

intents and purposes the application of these standards reduces the effectiveness, if not the entire purpose, behind Rule 29 of the Federal Rules of Criminal Procedure dealing with motions for judgment of acquittal. The Circuit Court's repeated statements as to the lesser degree of proof required by the prosecution as a practical matter, will result in most trial courts allowing the prosecution to go to the jury on almost all but the filmsiest type of case; with the result that a defendant can easily be speculated into a verdict of guilty depending upon the nature of the criminal charge, the type of defendant, and the individual juror. Courts cannot close their eyes to the tremendous psychological advantage the Government has in the eyes of the jury who, in many instances, believe, at the outset of a criminal trial, that the Government cannot be wrong.

In order to insure uniformity of rule in the administration of the criminal law, and to correct the injustices which have arisen in this case and will again arise in the future in the Second Circuit, this court is respectfully urged to set the matter at rest by establishing the majority standard of evidence to be applicable.

II

Was it a violation of Haas' Constitutional rights under the Fifth Amendment, warranting a dismissal of the indictment, to subpoena him before the Grand Jury at a time when he was marked for indictment by the prosecution, and without warning him of his Constitutional rights, elicit testimony from him, particularly in view of this court's opinion in *United States* v. *Minker*, 350 U. S. 179 (1956)?

The Second Circuit upholds the right of the prosecution to subpoena petitioner Haas before the Grand Jury, swear him, fail to warn him of his rights under the Fifth Amendment, elicit admissions and information concerning the crime for which Haas was thereafter indicted by the same

Grand Jury. The Second Circuit does not dispute the fact that prior to the time petitioner Haas was subpoenaed before the Grand Jury, he was clearly marked for indictment by the prosecution. (See opinion of District Judge Weinfeld, *United States* v. *Haas*, 126 F. Supp. 817, 818 (DC SDNY, 1954), "Haas although subpoenaed as a witness was clearly a prospective defendant by reason of past acts"; Affidavit of F. J. Donohue, I, 66-67; Statement of District Judge Palmieri on the argument of the motion, to the effect that petitioners Haas and Alprin were prospective defendants, I, 109-110).

The Second Circuit, in its opinion, concedes that it has had difficulty in establishing a "clear-cut rule" as to the need for a warning under these circumstances. The opinion cites *United States* v. *Scully*, 2 Cir., 225 F. 2d 113, cert. den. *Scully* v. *United States*, 350 U. S. 897; cf. *United States* v. *Giglio*, 2 Cir., 232 F. 2d 589, 594, cert. granted 352 U. S. 865.

The Circuit Court resolves the issue by positing a general rule, apparently applicable to all situations, *i.e.*, whether it be a witness, the named defendant, or a *de facto* defendant, that "the relevant inquiry ought always be whether the testimony was freely given all things considered". On this basis, without more, it concluded that since petitioner Haas was a "lawyer of training and experience", he waived his Constitutional right by testifying.[3]

Without going into the facts, which would certainly indicate that Haas was principally a certified public accountant rather than a lawyer of training and experience, nevertheless numerous State and Federal courts hold contrary to the Second Circuit as to the necessity of a warning when the prosecutor intends to seek the indictment of the witness under subpoena. See concurring opinion, Circuit Judge Frank, *United States* v. *Scully*, *supra* and cases cited at page 116.

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[3] Contrary is *United States* v. *Lawn*, 115 F. Supp. 674 (D. C. S. D. N. Y.), where Lawn, even though an attorney and former assistant United States Attorney, did not waive his constitutional rights.

But the Second Circuit Court's opinion thrusts much more deeply into the protection that the Fifth Amendment seeks to provide by holding that it is perfectly permissible for the prosecution to subpoena and call before the Grand Jury a person who is *de jure* or *de facto* an accused. It thus brushes aside the opinion of its own court in *United States* v. *Scully*, at page 116, that prosecutors must refrain from calling as witnesses before a Grand Jury any person who is *de jure* or *de facto* an accused.

While this court has not squarely considered the problem, it has certainly indicated its direction against the procedure sanctioned by the Second Circuit in *United States* v. *Minker*, 350 U. S. 179. Indeed, a greater threat to one's liberty and Constitutional rights under the Fifth Amendment exists in a proceeding in a criminal case than in a proceeding leading to denaturalization. Unquestionably, an investigation by a Grand Jury for the purpose of determining whether a crime has been committed is a "criminal case" within the meaning of the Fifth Amendment. *Counselman* v. *Hitchcock*, 142 U. S. 547, 562.

The opinion of the Second Circuit has extended rather than limited the right of a prosecutor to subpoena witnesses accused *de facto* or *de jure*, without any warning whatever, with the limitation of a vague requirement that their testimony be voluntary. Unless this court, in the interest of protecting the Consitutional rights of those accused or to be accused resolves this conflict between the Second Circuit and many other jurisdictions, both State and Federal, by prohibiting such a procedure, the abuses such as occurred in the instant case may be multiplied greatly in violation of due process and the privilege against self-incrimination under the Fifth Amendment.

III

Wasn't this conspiracy barred by the three year statute of limitations under this court's decision in *Grunewald* v. *United States*, 353 U. S. 391, inasmuch as it was merely a subsidiary agreement to conceal a prime conspiracy already accomplished?

After the completion of the trial but before the decision of the Second Circuit, this court decided *Grunewald* v. *United States*, 353 U. S. 391. The latter decision was not overlooked by the Second Circuit for it specifically distinguished the instant case from *Grunewald* v. *United States* on the sole basis that, "it (the present charge) was the same conspiracy and there was no new one merely to hide the past, as in *Grunewald* v. *United States*, 353 U. S. 391.". Consequently, it was a sufficient answer to Haas' contention that the crime was outlawed by the statute of limitations, said the Second Circuit, that the trial court charged the jury "was an overt act in furtherance of the conspiracy committed after September 17, 1951?".[4]

The Second Circuit set forth as "summary of acts of concealment", ten acts which occurred after September 18, 1951. In order to determine whether these acts of concealment were engaged in to conceal a conspiracy already accomplished, or such acts of concealment were part and parcel of the original crime of conspiracy, the criteria laid down in *Grunewald* v. *United States*, it is necessary to examine the charge in the indictment and the interpretation by the Second Circuit of the facts proved thereunder.

The Second Circuit held the indictment to charge an interference with or obstruction of the collection of the revenue by concealment of information and the nature and source of certain income in order to prevent a disclosure

[4] In this fashion; the jury was permitted to find that statements of the defendants and others made to Special Agents of the Treasury Dept. in 1952 long after the conspiracy was completed were in furtherance thereof.

to the Internal Revenue Service that the defendants, Hyman Harvey Klein and the three Canadians, evaded their income taxes for the years 1944 to 1947, inclusive.

Thus, the Second Circuit says, "the recipient of the drafts had many reasons for accepting payment in that fashion, but one of them was a desire which they shared with H. H. Klein to keep from the United States Treasury information which might lead it to conclude that he and the three Canadians had erroneously reported their income for the years 1944 to 1947.". This theory was an interpretation by the Second Circuit of one of three alternative fact situations submitted to the jury by the trial court, but the only one of which the jury could conceivably have convicted all the petitioners.

But this conspiracy to obstruct the revenue by concealment, says the Second Circuit, *was for the very purpose of hiding the crimes charged in the first four counts of the indictment.* This is clearly stated in its opinion as the "Background Events" leading up to the conspiracy herein charged. Said Chief Judge Clark:

> "During the very profitable years, 1944-1946, the inter-corporate manipulation and complexity were carried to a great length to obtain tax advantages. The basic theory of the prosecution's first four counts was that these corporations were sham and that Klein and his three associates were actually doing business as joint venturers. While the judge below eventually held that the corporations were bona fide, there was considerable doubt in the minds of Klein and his friends at the time they were selling Harwood's that the corporate entities would be respected by the United States Treasury and several legal opinions were solicited. *Having thus learned that the Treasury would be more inclined to ignore the Cuban corporation device if it discovered that the corporate officers were directing operations from the United States, Klein and his associates took steps to hide such facts.*"

Accordingly, nothing could be clearer than that the fifth count conspiracy, as interpreted by the Second Circuit, was

to conceal the very crimes alleged to have been committed in the first three counts, and particularly in the fourth count, which was a conspiracy to evade Klein's and the three Canadians' taxes by concealing the nature and source of their income from the Harwood whiskey profits.

Possibly with the decision of this court in *Grunewald* v. *United States*, in mind, Chief Judge Clark says by implication that the fifth count conspiracy to conceal began not in June, 1946, as charged in the fifth count, but at or about the time the contracts between Agencia and R. C. Williams & Company were signed in 1944. This is flatly contrary, however, to the instructions given by the trial court to the jury as to when the fifth count conspiracy began. He said the jury could not go back as far as 1944 in ascertaining the date when the fifth count conspiracy began (IV, 2593).

On the basis of the Second Circuit statement, it might be said that the Second Circuit found only one conspiracy beginning in or about 1944 to do the things charged in the fourth count of conspiracy and in the fifth count of conspiracy, although the conspiracies were set out in separate counts. If this interpretation be accepted, then the Second Circuit is in the position of sustaining as a separate crime of conspiracy a concealment of the principal crime, namely the crime charged in the fourth count. Neither this court nor Congress has sanctioned as a separate crime a charge of mere concealment of a statutory crime already accomplished.

Under the fourth count of conspiracy, the indictment set forth as part of the original crime of conspiracy:

> "17. It was further a part of said conspiracy that the defendants would conceal and continue to conceal the attempt to evade and defeat a large part of the income tax due and owing to the United States of America set forth in paragraphs 5 through 16 herein."

As interpreted by the Second Circuit, the fifth count, stripped of its verbiage, charged nothing more than the

overt act referred to in paragraph "17" in the fourth count. Had the fourth count gone to the jury without the instructions required by this court in *Grunewald* v. *United States*, a conviction would have been reversed. The substantive crime was complete at the latest when the alleged false and fraudulent tax return for the calendar year 1947 was filed by petitioner Klein on May 15, 1948. *Pendergast* v. *United States*, 317 U. S. 412; *Myres* v. *United States*, 8 Cir., 174 F. 2d 329, cert. den. 338 U. S. 849; *Cave* v. *United States*, 8 Cir., 159 F. 2d 464, cert. den. 331 U. S. 847. The conspiracy to commit the substantive offense has no longer period of limitation than the substantive offense itself. *United States* v. *Albanese*, 123 F. Supp. 732, 735 (D. C., S. D. N. Y.); Cf. *Bridges* v. *United States*, 346 U. S. 209, 223. Judgment of acquittal, however, was granted on the fourth count by the trial court, but not on the fifth count. Thus, what the prosecution could not accomplish in *Grunewald* v. *United States* by such an overt act under the fourth count, assuming the count went to the jury, it can now do, according to the Second Circuit, if it sets up as a separate conspiracy the overt act charged in the fourth count.

The fifth count conspiracy, as interpreted by the Second Circuit, was likewise complete upon the filing of petitioner Klein's 1947 tax return on May 15, 1948. The offense of obstructing the collection of the tax or the determination and assessment of it was complete when the information as to the nature and source of the income should have been reported and the tax paid. There is no continuing obligation to report this information year after year. The interference with the function of determining the taxes due existed, as claimed by the prosecution, if at all, when the obligation to report that income and to pay the tax existed. Section 22, Title 26, U. S. C.; *Jacobs* v. *Hoey*, 2 Cir., 136 F. 2d 954, 956. What activities were engaged in thereafter may be admissible as bearing upon intent or the existence of a conspiracy, but such evidence cannot extend either the obligation to report and pay or the duration of the crime. Cf. *Lutwak* v. *United States*, 344 U. S. 604, 617.

The vice of framing the charge as one broadly to defraud the United States by interfering with the Governmental function of determining or collecting the tax is further evident when the proof to support the charge is identical to the misdemeanor set forth in Section 145(a) of Title 26, U. S. C. Under that section Congress made it a misdemeanor to wilfully fail to "* * * supply any information, for the purpose of the computation, assessment, or collection of any * * * tax imposed by this chapter * * *." Under the 1939 Internal Revenue Code (§ 3748, Title 26, U. S. C.), a violation of this statute had a three-year staute of limitations. A conspiracy to violate this section would have no greater period of limitation. The Second Circuit Court's interpretation of the fifth count would indicate that the conspiracy here charged was to conceal the activities of the defendants and to withhold pertinent information from the officials of the Government in order for petitioner Klein and the three Canadian defendants to evade their income taxes for the years 1944 to 1947. On this basis, the filing of petitioner Klein's 1947 tax on May 15, 1948 would have been the day when this conspiracy became complete. Three years from that date would have been May 15, 1951, more than three years before the indictment was returned.

To sustain this procedure would effectively evade the salutary rule laid down by this court in the *Cruikshank* decision, and extend the duration of all conspiracies indefinitely, particularly since the trial court did not instruct the jury that the subsidiary crime to conceal was part of the conspiracy charged in the fourth count.

This is not the first time that this court will have before it an attempt by the Government to avoid the statute of limitations by camouflaging a charge as one to defraud the United States by interfering with a Governmental function. The identical device was struck down by this court in *Bridges* v. *United States*, 346 U. S. 209, 223-224. It should

similarly be treated here. The motive on the part of the prosecution is the same in the instant case as it was in *Bridges* v. *United States*, although the device used here is rather novel in that the alleged agreement of concealment is set out as a separate crime of conspiracy. Regardless of the "gimmick" used, the result will be the same, *i.e.*, "to open the very flood-gates against which Krulewitch warned". *Grunewald* v. *United States*, *supra*, p. 974.

IV

Wasn't the conviction obtained, on a charge varied and altered by the trial court, in violation of due process and the Sixth Amendment?

In the instant case, the Grand Jury returned the first indictment in May, 1954, and charged in the fifth count of that indictment a conspiracy "to defraud the United States in the exercise of its governmental functions in the assessment and collection of income taxes imposed by law and in the management of the revenue, * * *" (I, 34). The Grand Jury thereafter, on September 17, 1954, superseded Counts 4 and 5 of that indictment and eliminated from Count 5 one of the functions allegedly inferred with, *i.e.*, "assessment". The fifth count, as changed and on which petitioners were convicted, thus charged a conspiracy "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes".

Petitioner Haas moved for judgment of acquittal at the end of the prosecution's case and again at the end of the entire case on the ground, amongst others, that no proof whatever exists in the record to indicate a conspiracy to interfere with the function of collecting income taxes, and further, that proof of interference with the functions of

any other agency, office, or the Department of the Treasury relative to income taxes was not proof of the charge in the indictment (II, 805). The trial court denied these motions, as well as the petitioner Haas' requests to charge accordingly (II, 805; IV, 2360-2361).

The trial court held that the function of collecting taxes could not be enforced by the Treasury Department unless the Treasury Department could first determine and verify if any tax liability existed (IV, 2512). Proof, therefore, reasoned the trial court, from which the jury could find a conspiracy to impede or interfere with the determination by the ordinary processes of investigation and audit how much, if any, tax was owed by the defendants would sustain the charge in the indictment (IV, 2510). In other words, proof of a conspiracy to interfere with the *function of the Treasury Department in determining the existence of a tax* would sustain an indictment charging a conspiracy to interfere with *the function of the Treasury Department in collecting income taxes.*

The Second Circuit upheld the trial court's interpretation of the indictment on two grounds: (a) there was a sufficient charge of an interference with a lawful function of a department since the over-all responsibility of the Treasury Department was to secure the revenue; and (b) in any event, the petitioners were not misled by the allegation.

Both the trial court and the Second Circuit brushed aside well-defined principles established by this court and the Constitution of the United States regarding the nature of this charge, the need to set out all of the elements of the crime, and that the petitioners be convicted only on the charge in the indictment and none other.

In three respects, principally, were the trial court and the Second Circuit in error. First, the lawful function of collecting income taxes during the period in this indictment

was not vested in the Secretary of the Treasury or the Department of the Treasury, but in Collectors whose powers, rights, and duties were independently exercisable under a statutory grant from Congress. Second, a conviction cannot be permitted on a charge of impeding the function of collecting income taxes by proof of an interference with the function of determining a tax since no statutory power resides in the Collector of income taxes to determine a tax, and he cannot be interfered with in the exercise of a function over which he has no Congressional power to act. Third, an interference with a specific lawful function of the Government, which is the unlawful object of this conspiracy, must be alleged and cannot be inferred from the proof.

First. The very nature of the broad charge in the indictment must involve an interference with a lawful and exercisable function of a department or agency within the purview of the Constitution and laws of the United States. *Haas* v. *Henkel*, 216 U. S. 462; *Hammerschmidt* v. *United States*, 265 U. S. 182; *Curley* v. *United States*, 1 Cir. 130 Fed. 1. The indictment charges an obstruction of a lawful function of the Department of the Treasury, but the function of collecting income taxes has been from the earliest times vested exclusively in "Collectors of Internal Revenue", in whom such exclusive power was continued until the functions of that office were vested in the Secretary of the Treasury under the Revenue Act of 1954. Revised Statute, § 3183; 13 Stat. 238, as amended; 20 Stat. 331; Revenue Act of 1939, § 3651, Title 26, U. S. C.; Revenue Act of 1954, § 6301, Title 26, U. S. C. No control whatever over the Collector's appointment and removal existed in the Secretary of the Treasury. Revenue Act of 1939, as amended, § 3941, Title 26, U. S. C.; R.S. § 3142; Statements to the Congress by then President Harry S. Truman with regard to the reorganization of the Treasury Department on March 13, 1950, 1950 U. S. Code Cong. & Adm. News,

pp. 1412-1413; Statement of President Truman to the Congress on January 14, 1951, 1952 U. S. Code Cong. & Adm. News, p. 932. The supervision of the revenue by the Secretary of the Treasury did not carry with it, either directly or by implication, the right to exercise the function of collection of income taxes. R.S. § 3183; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 295; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 381.

Second. While the indictment thus incorrectly charged an interference with the function of the Treasury Department, which it did not have by Congressional grant, nevertheless petitioner Haas considered the charge as one to interfere with the function of the Collector in collecting income taxes (see petitioner Haas' Requests to Charge 4, 5, 6, 7, 8, 9, which were denied by the trial court; IV, 2360-2362). Under this conception of the charge, the nature of the functions of the Collectors, as defined by Congressional grant in Section 3641, Title 26, U. S. C., determined whether there was an unlawful interference with a lawful exercise of Congressional power. Cf. *United States* v. *Rumely*, 345 U. S. 41; *United States* v. *Lamont*, 2 Cir., 236 F. 2d 312. On the other hand, Congress placed the determination, audit, investigation and assessment of an income tax in a totally different office from that of the Collector. §§ 3640-3641, Title 26, U. S. C. The Commissioner, or his agent could not statutorily collect the tax any more than the Collector or his deputies could statutorily attempt to alter, amend or vary the assessment, or determine the existence of a tax and assess it. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 295; *George Moore Ice Cream Co.* v. *Rose*, 289 U. S 373, 381; *Harding* v *Woodcock*, 137 U. S. 43, 46; *Herwig* v. *Crenshaw*, 4 Cir., 188 F. 2d 572, 573, cert. den. 342 U. S. 905. Since these functions were derived from legislative enactment, the official designated by Congress was the only one who could properly exercise that function. *Trustees of St. Paul* v. *District of Columbia*, 212 F. 2d 244, 248 (C. A., D. C.);

Atcheson, T. & S. F. Ry. Co. v. *Batte*, 10 Cir., 110 F. 2d 767, 773; *United States* v. *68716 Sq. Feet of Land*, 79 F. Supp. 438, 442 (D. C., S. D. N. Y.).

Equally significant is the fact that the function of the Collector in collecting income taxes is exercisable only after the assessment, i.e., after the determination of the tax due. § 3641, Title 26, U. S. C.

Thus, if Congress did not see fit to give such a department or agency the exercise of such Federal power, an agency could not be impeded, obstructed, or interfered with concerning some activity over which no power to act has been provided. Cf. *Freidus* v. *United States*, 223 F. 2d 598, 601 (C. A., D. C.), where the court stated

> "No perversion of a governmental function could possibly result from a false statement that was incapable of affecting or influencing such function."

See also *Terry* v. *United States*, 8 Cir., 131 F. 2d 40, 44; *United States* v. *White*, 69 F. Supp. 562 (C. C. Cal., 1946); *United States* v. *Critteaden*, 24 F. Supp. 84 (D. C., W. D. N. Y.); *United States* v. *Waldin*, 139 F. Supp. 156 (D. C., E. D. Pa., 1951).

The same principle has been firmly established in those cases dealing with alleged contempts of sub-committees of the Congress where no Congressional authority existed to permit an inquiry in the matter before it. *United States* v. *Rumely*, *supra*; *McGrain* v. *Dougherty*, 273 U. S. 135; *United States* v. *Lamont*, *supra*.

Significantly, in the two cases cited by the Second Circuit to support the broad charge here of interfering with a function of the Treasury Department in the collection of the revenue, it cited *Kobey* v. *United States*, 9 Cir., 208 F. 2d 583; *Benatar* v. *United States*, 9 Cir., 209 F. 2d 734, cert. den. 347 U. S. 974. In *Kobey* v. *United States* the indictment charged an interference with and impeding of

"the proper and lawful functions of the Commissioner of Internal Revenue of the United States and the Collector of Internal Revenue for the Sixth Collection District in ascertaining, computing, levying, assessing and collecting taxes for the United States" (Count 1). In that case, in the colloquy with the United States, at page 353 of the transcript of the record on appeal, the following took place:

> "Mr. Binns (U. S. Attorney, S. D. Cal.): I can give you some additional authorities on this question of conspiracy to defraud by interfering with governmental functions
>
> The Court: *As I understand the essentials of that, it must be shown that the plan was to do something which would interfere with something that the official had a right officially to be concerned with. He might be interested in it, but if his official duties did not encompass it, it would not constitute interference, could it?*
>
> Mr. Binns: *That is correct, your Honor.*" (Emphasis added.)

Not only did the Government there indicate its agreement with the trial court's statement but it gave further evidence of that fact in its instructions which it requested the trial court to charge and which the trial court subsequently did charge. At page 112 of that record the Government submitted the following instruction:

> "Instruction No. 28
>
> Throughout the period of time covered by the indictment in this case the *Commissioner of Internal Revenue was an officer of the United States of America authorized and required to make inquiries and determinations and assessments of all taxes and penalties imposed by the Internal Revenue Code, and the Collector of Internal Revenue for the Sixth Collection District of California was an officer of the United States charged with the duty of collecting all taxes imposed by the internal revenue laws within his District, and to see that all laws and regulations relating to the collection of internal revenue taxes*

> *are faithfully executed and complied with*, and for these purposes either of these officials has the power to examine all persons, books, records and accounts to aid them in performing the above duties." (Emphasis added.)

In *Benatar* v. *United States*, *supra*, the functions allegedly interfered with were said to be functions of the Bureau of Internal Revenue "in ascertaining, computing, levying, assessing, and collecting taxes * * *" (at page 736).

Third: The official lawful function of the department or agency of the United States interfered with is an essential element of the crime charged. Nowhere in the indictment was there a charge of obstructing the functions of the Commissioner of Internal Revenue in determining, investigating, and auditing the taxes. In order to permit the prosecution to go to the jury it was necessary for the trial court to imply from the proof such an interference, although the function interfered with was not set out in the indictment. The vice in permitting the case to go to the jury on this totally different and unalleged charge was the shift brought about by the judgment of acquittal on the first four counts. It was anomalous, to say the least, that the function of collecting income taxes could be obstructed where no taxes were collectible. The shift then occurred to permit a conviction, not upon the charge of impeding and obstructing the collection of income taxes, but rather the impeding and obstructing of the determination, investigation, and auditing of a possible tax.

This, it is respectfully submitted, was a violation of due process and of the Sixth Amendment to the Constitution. The contention of the Second Circuit Court that the defendants were not misled by this shift in the charge overlooks completely the totally different type of proof required, depending upon which function is alleged to have been interfered with, as well as the totally different rights,

obligations and duties on the part of both taxpayers and those entrusted with the Governmental function. In any event, the doctrine of "harmless" variance under Rule 52(a) of the Federal Rules of Criminal Procedure can have no application where an essential element of the crime is not alleged. *Hagner* v. *United States*, 282 U. S. 427, 433; *Carney* v. *United States*, 9 Cir., 163 F. 2d 784, cert. den. 332 U. S. 842; *United States* v. *Fawcett*, 3 Cir., 115 F. 2d 764, 766; *Wishart* v. *United States*, 8 Cir., 29 F. 2d 103; Unreported Opinion 21348 of District Judge Dawson in *United States* v. *Harriman et al.* (D. C., S. D. N. Y., C140-65/1954). Indeed, Rule 52(a) dealing with harmless variance would likewise not apply where proof of obstructing the function of determining the tax is proof of a totally different and independent conspiracy than the one charged in the indictment, namely, impeding and obstructing the function of collecting income taxes. *Epstein* v. *United States*, 6 Cir., 174 F. 2d 754; *United States* v. *Byers*, 2 Cir., 73 F. 2d 419.

V

Can the prosecution avoid the statute of limitations applicable to a conspiracy to commit a substantive offense, avoid the principles of *res judicata* and double jeopardy, avoid the limitation of Section 371, Title 18, U. S. C., which provides for only one crime of conspiracy, by camouflaging a crime already charged and barred under a separate charge of conspiracy to defraud the United States by interfering with a function of the Government?

In the period involved herein Congress had specifically provided against attempts to evade and defeat its income taxes in any manner under Section 145(b), Title 26, U. S. C. It had further specifically provided that withholding information required "for the purposes of computation,

assessment, or collection of any tax * * *" was a misdemeanor under Section 145(a) of Title 26, U. S. C. Both offenses of their very nature involve an interference with the functions of proper officials of the Government in determining or in collecting taxes. The prosecution conceded this in its trial brief below, when it stated:

> "To mislead or conceal is a cardinal sin for a taxpayer in our system. Congress has sought to deter such conduct by making it felonious to attempt to defeat or evade the income tax in any manner. Internal Revenue Code, Section 145(b). Where a taxpayer conducts his affairs in a manner which is misleading or concealing knowing that the effect will be to impede the Revenue officials in determining the true tax liability for a taxable year in which the taxpayer has stated his liability to be less than he in fact owes, he has attempted to evade or defeat the income tax as that offense is defined in the Internal Revenue Code. Similarly, if a taxpayer by misleading or concealing conduct impedes the Revenue officials in the collection of a tax which has been assessed by the Government, he has violated Section 145(b)."

Section 371 of Title 18, U. S. C., furnished the Government with a vehicle to punish a conspiracy whose objects were the obstruction of these functions. Thus, a conspiracy to interfere with the function of determining a tax where the Government was cheated out of taxes is nothing more than a conspiracy to commit the substantive offense under Section 145(b). A conspiracy to interfere with the function of determining the tax by withholding or concealing information as to the nature and source of one's income, where no taxes are due, is a lesser crime, apparently nothing more than a conspiracy to violate Section 145(a), assuming that the 145(b) conspiracy did not completely over-lap the 145(a) conspiracy.

Obviously, the acquittal on the fourth count conspiracy concluded any charge involving cheating the Government out of its taxes. The statute of limitations precluded a charge of conspiracy to violate Section 145(a) since, as the Second Circuit Court interprets the charge and the proof, petitioner Klein's income tax return for the year 1947 consummated the conspiracy when that return was filed on May 15, 1948, assuming again for the moment that the acquittal on the fourth count did not conclude any charge on a 145(a) conspiracy.

Consequently, the prosecution fashioned an artificial crime in the fifth count of a conspiracy to withhold and conceal economic information from the Treasury Department by framing the indictment in the language of the second half of Section 371, to defraud the United States by interfering with and obstructing a lawful function of the Treasury Department. In this manner, the statute of limitations is thwarted, the principles of *res judicata* and double jeopardy are disregarded, the violation of a single act is now extended to include a third crime of conspiracy involving the Internal Revenue laws without specific Congressional authority and indeed in contravention thereof, and concealment or withholding of information concerning the nature and source of one's income is equated with the trickery, deceit, and dishonest means considered necessary for proof of a defrauding of the United States under § 371, Title 18, U. S. C.

The Second Circuit upholds such a "gimmick" by distinguishing the charge in the fifth count from "mere failure to disclose income", which it says would not constitute the crime of defrauding under Title 18, U. S. C., Section 371. Yet, the charge as altered by the trial court and the proof submitted involved nothing else but a withholding or concealment of the nature and source of certain income through various devices. As it went to the jury the charge

was nothing more than a failure on the part of the defendants to disclose the income from the Harwood profits, which the prosecution contended should have been done. Indeed, the trial court instructed the jury they could find the defendants guilty of defrauding the United States by the identical type of affirmative conduct which this court held in *Spies* v. *United States*, 317 U. S. 492, 499, would evidence a wilful attempt to evade taxes. The trial court extracted from that opinion almost word for word the conduct there referred to as proof of the defrauding charge in the fifth count.

In another context, this court has held that fraud is not an essential ingredient of the crime charged under the predecessor section of 145(b), Title 26, U. S. C. *United States* v. *Scharton*, 285 U. S. 518, 520-521; *United States* v. *McElvain*, 272 U. S. 633, 638. The conduct which thus may evidence a violation of Section 145(b), Title 26, U. S. C., can scarcely be considered the equivalent of the trickery, deceit and dishonest means considered a defrauding of the United States under *Haas* v. *Henkel*, 216 U. S. 462, *Glasser* v. *United States*, 315 U. S. 60, and *Manton* v. *United States*, 2 Cir., 107 F. 2d 834, cert. den. 309 U. S. 664.

The fifth count did not charge, nor did the proof show, any over-reaching, chicanery, or deceit practiced on employees of the Government such as existed in *Haas* v. *Henkel*, *supra*, *Glasser* v. *United States*, *supra*, and *Manton* v. *United States*, *supra*; cf. *Hammerschmidt* v. *United States*, 256 U. S. 182.

The indictment, as interpreted by the trial court and the Second Circuit, thus represents an improper extension of the crime charged under the second half of Section 371, Title 18, U. S. C., to conduct which may have been within the express provisions of the Internal Revenue Code, provided the elements of proof existed and the prosecution was timely brought.

Haas v. *Henkel, supra,* and *Hammerschmidt* v. *United States, supra,* sustained the adequacy of language of an indictment similar to the present charge where the charge was established by competent evidence. Those decisions do not, however, support the proposition that where the language employed is adequate, the charge therein contained will be a valid one, if in fact the charge is nothing but a camouflage. Otherwise, the prosecution can lay aside all conspiracies to commit the substantive offense of an attempt to evade taxes where difficulty might arise in proving that additional income was due, for example, and charge instead a conspiracy to defraud by interfering with the determination of the tax through concealment of income without regard to whether the correct income was reported; or do as the prosecution did here, charge in two separate counts two apparent separate conspiracies where the objects are identical, but where the conspiracy to defraud might be made out by simply not requiring as an element of that crime proof that additional taxes were due. It also would permit the prosecution to lay aside a conspiracy to commit the misdemeanor in Section 145(a), whenever the prosecution might be barred by the statute of limitations, or whenever the prosecution sought the felony punishment rather than the misdemeanor provided in Section 145(a).

The Second Circuit upholds such a "gimmick" on the further ground that the prosecution may allege the same charge of conspiracy in different counts (fourth and fifth), with the protection that only a single penalty is permitted. The rule announced by this court in *Albrecht* v. *United States,* 273 U. S. 1, and in *Blockburger* v. *United States,* 284 U. S. 299, does not support that contention with regard to the conspiracy statute under Section 371, Title 18, U. S. C. This court has held that "The conspiracy is the crime, and that is one, however, diverse its objects." *Frohwerk* v. *United States,* 249 U. S. 204, 210; *Braverman* v. *United States,* 317 U. S. 49, 53-54. The holding of the

Second Circuit is additionally in conflict with *May* v. *United States*, 175 F. 2d 994, 1002 (CA DC), cert. den. 338 U. S. 830, where the Court of Appeals for the District of Columbia held that Section 371, Title 18, U. S. C., did not describe two offenses of conspiracy, but only a single one.

The issue, thus, is not a question of double punishment for a single act which gives rise to a possible violation of two separate statutes or of two crimes in a single statute, but on the contrary, the right of the prosecution to convert into two crimes facts which give rise to only one crime, and where only one crime of conspiracy is permitted under the statute. Under this view, an acquittal on the fourth count had to dispose of the fifth count as well. The great danger to the Constitutional rights of persons accused of crime, which is threatened by this extension of the conspiracy doctrine, is well illustrated by what the trial court said below:

> "The Court: * * * I recognize the fact, and I am quite alive to it, that what they have done here is charge * * * a conspiracy count for that tax evasion and then virtually on the same facts an independent conspiracy. I am alive to it. I recognize that. And I frankly say to you that I am not prepared to say that they cannot do that. If perchance there were a conviction in this case and if perchance they were sustained, this would become a bellwether case for the Government, because I will say to you without Congressional relief we would all be in a rather precarious position—this would be extending the prosecutor's darling of a conspirators' count to an absurdity. * * *" (II, 1006-1067)

VI

When the nature of the services rendered by a certified public accountant and tax attorney is measured by applicable regulations of the Commissioner of Internal Revenue, is it not a violation of due process to deny his requests to instruct the jury of the content of those regulations and his rights and duties thereunder?

Haas was a certified public accountant and a tax lawyer. The conclusion seems inescapble that Haas was held in this case because of his accounting and legal services on some theory of aiding and abetting or counseling petitioner Klein, and later petitioner Alprin, without any proof whatever that such services were performed with knowledge on Haas' part of the existence of any criminal agreement or undertaking which the prosecution contended existed between Klein, Alprin, Koerner, and Roer. Haas was acquitted of aiding and abetting in the first three counts, and appropriate here in this regard is the majority opinion of this court in *United States* v. *Falcone*, 311 U. S. 205, 210.

Inasmuch as the trial court and the Second Circuit considered that evidence as to Haas' accounting and tax services could permit the jury to convict him of the crime of conspiracy, it was essential that the jury be instructed as to Haas' obligations and rights in connection with his normal function as an accountant and tax attorney. This is more than ever vital in view of the nature of the charge. The vagueness of a charge of interfering with or obstructing the functions of the Treasury Department in collecting income taxes makes it almost impossible for any practitioner, such as petitioner Haas is, to ever predict or to know in advance as to what conduct would constitute a violation of such a criminal statute.

The minimum protection that petitioner Haas was entitled to was an instruction from the trial court to the jury as to what his rights and obligations were under existing

Treasury regulations governing the services he performed. These were embodied in Requests Nos. 16, 17, and 18, which the trial court denied. (IV 2365-2366)

An indictment such as this constitutes a grave threat to professionals, both accountants and lawyers, with respect to acts shown to be inherently proper, ethical, and within the scope of their professional responsibility to their clients.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Attorney for Petitioner.